Leases, rocks, and hard places

Leases, Rocks, and Hard Places: Estates without Contracts and Contracts without Estates

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I. Introduction

It is striking to see the medieval phrase "livery of seisin" in the text of a Court of Appeal judgment from 2021, as happened recently in *Procter v Procter*[1] - one skirmish in a long-running war of attrition between siblings as to their inheritance in a large agricultural property. Geoffrey Procter devised a set of family trusts, a partnership, and company lease arrangements of impressive complexity, to avoid Capital Transfer Tax. As day-to-day arrangements disregarded these legal structures, it is unsurprising that when Geoffrey died his children were unable to peaceably resolve who was entitled to what in relation to "the Farm Inheritance". The question for the court was whether A, B, and C as trustees can grant a legally enforceable lease to A, B, C, D, and E as beneficiaries, which, on the facts, might entitle that tenancy to protection (with significant financial consequences) under the Agricultural Holdings Act (AHA) 1986, in a scenario where one of the three Procter siblings wanted to separate and sell her share of the Farm Inheritance. The first instance judge held the purported lease impossible both under the Law of Property Act (LPA) 1925, because of the lack of a written instrument, and at common law, because of the overlap between landlords and tenants. The Court of Appeal was left to consider the impact of multiple legal personalities vested in one person, and leases to oneself.

This article considers the recent legal history of a lease to oneself, and what this case says about the status of the lease in English law. A lease, with its conventionally dual character as both an estate in land and contractual relationship, might be considered valid in one sphere but not the other. This case gave rise to questions about leases as estates without contractual content – the mirror image of the "non-proprietary lease" established in *Bruton v London Quadrant Housing Trust*.[2]

[1] [2021] EWCA Civ. 167; [2021] Ch. 395.
[2] [2000] 1 A.C. 406 (HL); [1999] 3 All E.R. 481.

Whilst some of the legal points raised in *Procter* are specific to its agricultural context, others are of broader significance in thinking about the difficulties facing the concept of the lease.

There are two legal difficulties in relation to a purported lease to oneself: one is the principle that no tenant can be their own lord. One important aspect of this is the doctrine of merger - the law on which has changed significantly over time. The second difficulty is that in English law, a lease is usually described as both an estate in land and contractual relationship.[3] A contract requires (at least) two parties, so that even if a lease to oneself is possible as a matter of land law, it would appear to lack contractual content in the form of the covenants that are normally an inherent part of leases. The LPA 1925 had provided for this problem in respect of leases within its remit, but in a context where the distinction between a lease to oneself (from A to A) and a lease to oneself and others (from A to A and B) is not entirely clear – especially in light of subsequent case law.

This was complicated by the fact that the purported lease in *Procter* arose by conduct and not pursuant to a written instrument. After some discussion of *Rye* v *Rye*[4] the Court of Appeal held that a tenancy by conduct did not fall within the provisions of the LPA 1925 and the Land Registration Act (LRA) 2002 which depended on, inter alia, the presence of a conveyance or disposition in writing. The historical and theoretical issues raised concerning a lease to oneself - engaging contract law, real property rights, and their interaction with equity and trusts - fell to be considered under common law principles and not the core statutory regime embodied in the LPA 1925 and LRA 2002. The Court of Appeal nonetheless concluded that a lease to oneself and others jointly had been possible before the 1925 Act as well as under it, and that, contrary to the trial judge, the proposed *Procter* lease was not incapable of being created.

This begs questions as to whether the need for there to be a meaningful contractual relationship between landlord and tenant precludes a property arrangement involving the same party(s) acting in the guise of different property right holders, and, conversely, whether the rules governing property rights are meaningful if lacking the usual contractual elements. Further, it invites exploration of whether the exceptions to the time-honoured property law rule that "no tenant can be their own lord" are consistent with the exceptions to the contractual rule that no person can contract with themselves.

[3] Hence leases can be altered or invalidated by the contractual doctrine of frustration, for instance: Canary Wharf v European Medicines Agency [2019] EWHC 335 (Ch.); [2019] 2 W.L.U.K. 275; National Carriers Ltd v Panalpina [1981] A.C. 675; [1981] 1 All E.R. 161.
[4] [1962] A.C. 496 (H.L.); [1962] 1 All E.R. 146.

This article will argue that the lease to oneself in general ought to be not only possible under current law, but was something which the LPA 1925 actively sought to enable – a conclusion which calls into question the decision in *Rye* v *Rye*. It will argue that *Rye*, and the interpretation of the LPA 1925 therein, misinterprets that Act under the influence of a contractual mindset not entirely appropriate for leases. It will also argue that the dissenting judgment of Lord Millett in *Ingram v IRC*[5] takes a more appropriate, proprietary, approach.

II. The Facts

In *Procter,* a freehold piece of the Farm Inheritance used for agriculture ("the Farm Land") was held under one of several family trusts (the "Will Trust"). The trustees of the Will Trust had varied, but by 2014 the single surviving trustee was Philip Procter. The beneficiaries of the Will Trust are harder to describe, but included a family trust for the siblings and other family trusts - structures which ultimately benefitted the siblings in various proportions. A business partnership between the siblings; Philip, James, and, until 2010, Suzanne (henceforth, "the Partnership") used the Farm Land, allegedly pursuant to a lease. Establishing the elements of a lease[6] under *Street* v *Mountford*[7] was one of easier tasks: the trial judge found rent (paid via accounting adjustments), a term certain, and exclusive possession.[8] It is worth noting that "intention to create legal relations" was also considered significant, harking back to pre-*Street* case law.[9] The Partnership initially leased the Farm Land pursuant to written agreements, which lapsed in 1994. It was argued a tenancy by conduct then arose.

III. Leasing to Oneself and Others

[5] [1997] 4 All E.R. 395; [1997] S.T.C. 1234.
[6] The criteria for a lease under the Agricultural Holdings Act 1986 applied in this case differ from the criteria for a lease at common law, as what would otherwise be contractual licences are considered tenancies under that Act. This does not materially affect the issues discussed.
[7] [1985] A.C. 809 (HL); [1985] 2 All E.R. 289.
[8] The difficulties with tenancies at will, parol leases, and section 54 LPA 1925 were also discussed, but need not concern us here.
[9] For the ongoing role of intention after *Street v Mountford*, see in particular Susan Bright, 'Street v Mountford Revisited' in idem (ed), *Landlord and Tenant Law: Past, Present and Future* (London: Bloomsbury, 2006).

There are cases wherein A purports to grant a lease to A and B from as least as early as the 1830s: *Doe d Colnaghi v Bluck*[10] had no apparent conceptual difficulty with an informal lease from one partner (A) to the partnership (A and B), although this seems to have been on an estoppel basis.[11] The more recent case of *Rye v Rye* is confused authority on whether the LPA 1925 enabled the possibility of any such overlap between grantor and grantee where common law had not. *Rye* involved freehold land held by two brothers as tenants in common in equal shares. They attempted to lease the property to their solicitors' partnership in order to reflect that they were unequal partners in business. This failed on the basis that the Court held the LPA 1925 did not enable a lease directly to oneself (as opposed, for instance, to oneself and others jointly), and because the lease was made orally and not in a conveyance, as required by the wording of the relevant LPA 1925 provisions.

All the judges in *Rye* agreed that a straightforward lease from A to A alone was not possible under the LPA 1925 or the common law. Lord MacDermott also thought A had not been able to grant a lease to A and B jointly at common law.[12] In fact, the doctrine of merger and the possibility of severance of a legal estate prior to 1925 simplified this somewhat and it appears the lease would only be inoperative in respect of A's share.[13] However, Lord Radcliffe seems to have viewed common law as indistinguishable from the LPA 1925: if there were not complete identity between landlord and tenant, or the individuals were acting in different capacities, it was possible.[14] *Rye* concluded that its purported lease was not valid under the LPA 1925, but did not go on to consider the common law position on the lease to oneself (which was not pleaded). This was the new territory *Procter* traversed.

Preliminary mention should also be made here of one other key case: in *Ingram v IRC*[15] the House of Lords approved a dissenting judgment from the Court of Appeal[16] – unusually, the dissent was based on an argument neither party had made. Lady Jane Lindsay Ingram had conveyed a freehold to her solicitor in order to enable them to lease the property back to her in two parts. The solicitor then conveyed the freehold to trustees for the benefit of Lady Ingram's children and grandchildren. The Capital Transfer Tax liability upon Lady Ingram's death depended on the validity of the leases

[10] (1838) 173 E.R. 577; (1838) 8 Car. & P. 464.
[11] See especially *Doe d Colnaghi v Bluck* (1838) 8 Car. & P. 464 at 467 (Talfourd, Sjt. and Hindmarsh).
[12] *Rye v Rye* [1962] A.C. 496 (H.L.) at 507.
[13] *Rogers v Harvey* (1858) 141 E.R. 1; (1858) 5 C.B.N.S. 3 at 10 (Byles J. and Welsby).
[14] *Rye v Rye* [1962] A.C. 496 (H.L.) at 511.
[15] [2000] 1 A.C. 293 (HL); [1999] 1 All E.R. 297.
[16] *Ingram and another v IRC* [1997] 4 All E.R. 395.

and whether it was possible for an agent such a solicitor to grant a lease to his principal. Whilst the Court of Appeal had held it was not, based on *Rye,* such that the leases were invalid, the House of Lords took the opposite view: whilst a lease to oneself might pose difficulties in respect of the enforceability of the covenants therein, the contractual two-party rule did not preclude the existence of a valid lease here, as the parties had all presumed. Ultimately, these cases depended on the interpretation of the LPA 1925, and its precursors in the common law.

1. Under the LPA 1925

They key provision in the LPA 1925 on leases to oneself is s. 72, which clearly does provide that a *conveyance* may move property in land from a person (A) to themselves *jointly* with another person(s) (B):

> "(1) …personal property, including chattels real, may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person.
> (2) …freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed to him to another person…"

The reference to "by like means" was inherited from earlier statute, and refers to the various methods of transfer used prior to 1925: not just deeds, but also the "lease and release" of freehold land originally developed to avoid the Statute of Enrolments.[17] This section clearly requires the existence of a "conveyance", and *Rye* interpreted this and s. 205(1)(ii) LPA 1925 to mean that "conveyance" means a written instrument:

> "205(1)(ii) 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein *by any instrument*, except a will…"

The Court of Appeal held that it followed that the alleged tenancy by conduct in *Procter* fell outside the scope of s. 72 in the same way the *Rye* oral tenancy had nearly sixty years earlier. However, it

[17] See for instance Joshua Williams, *Principles of the Law of Real Property*, 18th edn (London: Sweet and Maxwell, 1896) at pp. 141-6 and pp. 201-2.

is important to consider the history and context of these provisions in order to understand their application (or not) in the case law.

(i) "Conveyance" in Respect of Leases

Section 72 LPA 1925 was the descendent of a line of previous statutory provisions. In earlier English law, the Statute of Uses 1536 had facilitated the transfer of freehold land from oneself to oneself and others jointly. Where A was seised to the use of B, the statute executed the use and vested the legal estate in B.[18] This could be used to enable the transfer from A to A and B (what Lewison L.J. in *Procter* referred to as a useful "side effect").[19] If A transferred to X to the use of A and B, the effect of executing the use was that legal title became vested in A and B jointly where it was formerly in A alone.

However, the Statute of Uses required that A was seised of the land, meaning it did not apply to chattels real like leases – a person could be possessed of a lease but never seised of it.[20] It had been settled from an early date that leases were not real property, the key distinctions being the legal remedies available to the leaseholder and the devolution of the property on death.[21] Whilst these distinctions diminished over time, the leasehold did not gain the status of fully real property until the LPA 1925. At the same time, the attempt was made to "assimilate" freehold to moveable property, bringing its features closer to leasehold.[22] This categorisation could not realistically change earlier than 1841, when statute simplified the modes of conveyancing for freehold property: the "lease and release", which worked precisely because leases were not estates in land with seisin, was too important.[23]

Facilitating the *transfer* (as distinct from creation) of a lease, and personal property generally, to oneself and others was the intended effect of s. 21 of the Law of Property Amendment Act 1859:

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[18] See further John Baker, *An Introduction to English Legal History,* 5th edn (Oxford: Oxford University Press, 2019) at pp. 309-11.
[19] *Procter v Procter* [2021] Ch. 395 at [13].
[20] *Cranmer's Case* (1572) 134 S.S., Appendix 1, No. 6 (Jeffreys Sjt.). Relatedly, the Statute of Uses did not execute a use of a lease: *Mantell's Case* (1542) O.H.L.E, Vol. VI, 677 n. 158; see also John Baker, *An Introduction to English Legal History* (2019) at pp. 309-10; p. 323.
[21] Frederic W Maitland, 'Seisin of Chattels' (1885) 1 L.Q.R. 324.
[22] See further sections IV and V below.
[23] For this in practice see Joshua Williams, *Principles of the Law of Real Property,* 18th edn (1896) at p. 146; Stat. 4 & 5 Vict. c. 21; 37 & 38 Vict. c. 96; 7 & 8 Vict. c. 76, s. 2; s. 13; 8 & 9 Vict. c. 106, s. 2.

> "Assignment of Personalty – XXI. Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another."[24]

The 1859 Act co-existed with the Statute of Uses for several decades, until the latter was repealed by s. 207 and Schedule 7 of the LPA 1925.

The 1859 Act, however, used the term "assign": leases, as chattels real, could not be "conveyed" – only real estates in land could be the subject of conveyances.[25] When s. 21 LPAA 1859 later evolved into s. 72(1) LPA 1925, "assign" became "convey". This provision in the LPA 1925 seems to adapt to the changed categorisation of leases as one of the two estates in land recognised by the 1925 Act.[26] However, even the Conveyancing Act 1881 referred to "conveyances" of "leasehold property"[27] in a context where "conveyance" was defined in a similar way to the LPA 1925:

> "2(v) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, *made by deed*, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance…"[28]

This earlier statute allowed the parties' contrary intentions to deviate from the statutory definition, providing more flexibility. The wording of the 1925 provision remains odd in context: personal property is not "conveyed", even if leases could be after 1925:

[24] Law of Property Amendment Act 1859 (22 & 23 Vict. c. 35), s. 21.
[25] See, e.g. Joshua Williams, *Principles of the Law of Real Property,* 18th edn (1896) at p. 141.
[26] LPA 1925, s 1. Juanita Roche, 'Historiography and the LPA 1925: The Return of Frankenstein' (2018) 77(3) C.L.J. 600 raises the fascinating question of whether the text of s. 1(1) was really the intended outcome when the 1925 Acts were being drafted, especially given that it appears inconsistent with s. 1(4). Notwithstanding that s. 1(4) acts as a word-saving device by deeming "estates, interests, and charges" legal estates for the purposes of the provisions of the Act using that term, rather than actually converting any such interests into estates in substance, the drafting is convoluted for such a key provision.
[27] Conveyancing Act 1881 (Stat. 44 & 45 Vict. c. 41), s. 7.
[28] Conveyancing Act 1881 (Stat. 44 & 45 Vict. c. 41), s. 2(v) (emphasis added).

> "72(1) …personal property, including chattels real, may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person."

It is inescapable, however, that a "conveyance" under the LPA 1925 requires an "instrument", such that *Procter*'s oral lease falls outside the remit of the statute. It is nonetheless important to briefly review the remaining parts of s. 72 in order to understand the decisions in *Rye* and *Procter*.

(ii) Conveyance to Oneself under the LPA 1925

Section 72(2) LPA 1925, originated in a different statute to s. 72(1), namely s. 50 of the Conveyancing and Law of Property Act 1881, which was designed to simplify conveyancing practice and made it possible, explicitly, to convey a freehold from A to A *and* B.

> "50 – (1) Freehold land, or a thing in action, may be conveyed by a person to himself *jointly* with another person, by the like means by which it might be conveyed by him to another person…"[29]

Section 50 of the 1881 Act, however, seemed to conflict with the contractual rule that a promise made by A to A themself was ineffective – on which further below. The practical impact was that although property law permitted the conveyance, it seemed contract law deprived it of detailed content in the form of covenants made with oneself or oneself and others jointly: not a particularly practical or attractive outcome.

Section 72 of the LPA 1925 included two similar rules with quite different origins, via the same mechanism. Although *Rye* interpreted it as such, it is not stated in s.s. 72(1) and 72(2) that A may transfer to A and B only where A is acting in two capacities (as with trustee and beneficiary). Instead, the statute effectively overlooks the presence of A as transferee, enabling the transfer "by like means" as when made to B alone. Rather than solve the problem of A's existence on both sides of the equation, it ignores the difficulty to facilitate the outcome. This was likely one of many concessions to practicality in the 1925 Acts: as Roche has noted, controversial issues received great attention, but detailed provisions elsewhere would have been too time consuming for the drafting

[29] Emphasis added. The rest of the section, as with LPA 1925, s. 72(2), concerns husbands and wives.

Committees or Parliament to address in such an enormous piece of legislation.[30] It is difficult to see how it would have directly addressed the problem, in any case, given the "curtain principle" and the intention that the LPA 1925 would use trusts to simplify title investigations.

2. Nemo potest esse tenens et dominus and merger

A lease to oneself might have had to overcome the problem of merger in pre-1925 law. Merger, based on the concept that *nemo potest esse tenens et dominus*,[31] had the effect that where one person came to hold two estates in the same land, the inferior estate merged into the superior. The effect of merger in respect of a later acquisition is distinct from the grant of a lease to oneself or oneself and others at the outset: for example, it applies where A grants a lease to B and B later acquires the reversion, but not where A grants a lease to A and B from the outset.

Merger could cause significant practical difficulties and limits were recognised: it would occur only if both the person holding it and the rights themselves were the same:[32]

> "…they must come to one and the same person in one and the same right; else if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger."[33]

Furthermore, even where merger occurred at law, an equitable presumption might preserve the existence of these merged rights, depending on intention. This usefully enabled rights to be kept alive and re-granted later.[34] *Belaney v Belaney*[35] is a good example: the tenant under a lease purchased the reversion but deliberately had it conveyed to a trustee to hold on bare trust with the intention to prevent merger.[36] It was the equitable approach to merger which survived the test of time, preferred by s. 25(11) of the Judicature Act 1873, and s. 185 LPA 1925. Merger does not, therefore,

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[30] Juanita Roche, 'Historiography and the LPA 1925: The Return of Frankenstein' (2018) 77(3) C.L.J. 600 at 604 and 610.
[31] "No one can be the tenant and the lord": 2 Bl. Comm. 177.
[32] *Webb v Russell* (1789) 100 E.R. 639; (1789) 3 Term Rep. 393 (Lord Kenyon C.J.).
[33] 2 Bl. Comm. 177.
[34] Discussed, for instance, in *Capital and County Bank Ltd v Rhodes* [1903] 2 W.L.U.K. 107; [1903] 1 Ch. 631 at 652 (Cozens-Hardy L.J.).
[35] (1867) L.R. 2 Ch. App. 138; [1867] 1 W.L.U.K. 23.
[36] This was cited by Millett L.J. in *Ingram v IRC* [1997] 4 All E.R. 395, contradicting the majority, who thought the same transaction impossible.

prevent the existence of a lease to oneself having full effect at law where that lease was originally between two or more parties – for instance where A leases to B, and B later acquires A's reversion intending to re-grant it to a third party, as in *Belaney*. However, this was not firmly established in post-1925 case law – and it seems to have been assumed the opposite was true on the basis of *Rye* until the House of Lords' consideration of *Ingram v IRC*.[37] A lease to oneself alone, of course, was never affected by merger, because nothing at all passed at common law in such a scenario.[38]

In pre-1925 law, the *nemo potest esse tenens et dominus* principle was also used in some cases to collapse a part of the equation in lease to oneself and others cases, albeit in a way that would now make exclusive possession hard to identify. For instance, in *Rogers v Harvey*, where A as landlord informally sub-leased to a partnership consisting of A, B, C, and D. A's interest as tenant was considered as never having been separated from their superior interest as landlord. This left B, C and D as tenants of undivided shares, with A as landlord also holding an undivided share – just as A had before the grant. *Napier v Williams*[39] then found that the only way to make sense of a grant of a lease by A, B, and C to A alone was to sever the joint tenancy during the term of the lease and view A's interest as tenant as part of their superior interest, with the result that the land was held by A as 1/3 freehold and 2/3 leasehold, with B and C having the reversion of their respective 1/3s. Both cases used the language of merger, notwithstanding that merger generally concerns the acquisition by the same person of existing interests in land, not the creation of new rights.

It is true that the law was not entirely consistent on this point: in *Churcher v Martin,*[40] it was held that whilst trustees are not a corporate body, they are joint owners of the trust property, and joint possession of trustees excludes any one of them possessing on his own behalf (even if trustee and beneficiary are physically the same person). The issue of merger was not addressed in *Churcher*, but it may be that impliedly merger was prevented by the fact the trustees thought (incorrectly) they were acting under a charitable purpose trust – clearly in that scenario merger would not have been intended. This is at the least inconsistent later developments, as set out in *Hammersmith LBC v Monk*[41] where Lord Browne-Wilkinson noted that joint tenants with a lease are not treated as one legal person (see at [10]-[11]). *Churcher* was also likely incorrect in its own time: *Doe d Aslin v Summersett*[42] held that all individual joint tenants must consent to the ongoing existence of a lease.

[37] *Ingram v IRC* [1997] 4 All E.R. 395 at 422, supported by the House of Lords: [2000] 1 A.C. 293 (H.L.) at 296.
[38] My thanks to the Reviewer of this article for comments helping to clarify this section.
[39] [1911] 1 Ch. 361; [1911] 1 W.L.U.K. 60.
[40] (1889) 42 Ch. D. 312; [1889] 6 W.L.U.K. 5.
[41] [1992] A.C. 478 (HL); [1992] 1 All E.R. 1.
[42] (1830) 109 E.R. 738; (1830) 1 B. & Ad. 135.

In any case, since the enactment of the Law of Property Act 1925 this severance cannot happen at law. Only a joint tenancy and not a tenancy in common is possible at law under s.s. 34(1) and 36(2) LPA 1925. It follows that, for instance, the parts of the *Procter* leasehold held by A, B, C, D, E cannot exist as undivided parts of the freehold held by A, B, and C - because D and E's interest cannot be severed. This is, however, difficult to grapple with in respect of the practical consequences of A granting to A and B. Where A, B, and C are the tenants of A and B, the net effect would be that C pays any rent due to A and B: as in *Rowley v Adams*,[43] for instance. If the right of exclusive possession is enforced by landlords A and B, C will be dispossessed. This is the logical consequence of the claim that A and B hold both the term and reversion in different capacities, as Lewison L.J. noted in *Procter*.[44] Can A evict B, a tenant but also fellow landlord? Surely not. This was Stuart V-C's concern when he said in *Grey v Ellison*[45] that it would be a "mere whimsical transaction".[46] Millett L.J. in *Ingram* argued that these sorts of challenges were simply economic problems (see at 424), but it appears to raise problems with severance: unity of rent is practically absent in at least some of the cases, suggesting that they would now be viewed as licences, not leases.[47]

However, the impossibility of severance in post-1925 law is not necessarily a problem, and in fact preserves the lease relationship as created at law. At equity, the merger rule persists, and merger depends on intention. Notwithstanding the distinction between merger as applying to interests in land which have already been created and the creation of new interests outlined above, Lewison L.J. in *Procter* found this relatively straightforward: a mutual duty of good faith applies within a partnership, such that where a partner grants a tenancy to a partnership for the benefit of the business, a merger cannot be intended and equity will preserve the two separate interests of landlord and tenant.[48]

[43] (1844) 49 E.R. 1178; (1844) 7 Beav. 548.
[44] *Procter v Procter* [2021] Ch. 395 at [75].
[45] (1856) 65 E.R. 990; (1856) 1 Giff. 438.
[46] Noted in *Procter v Procter* [2021] Ch. 395 at [59].
[47] Following *AG Securities v Vaughan; Antoniades v Villiers* [1990] 1 A.C. 417; [1988] 3 All E.R. 1058. As noted, the agricultural context of *Procter* meant a different lease/licence distinction applied.
[48] *Procter v Procter* [2021] Ch. 395 at [55]. The language of the judgment is sometimes more precise than others in respect of merger occurring only when previously created rights are acquired, see for example [37] compared to [49], although this was not vital to the decision.

3. Landlord and Tenant as Trustee and Beneficiary

Rye held that even under the LPA 1925, a lease to oneself was not possible: A-trustee cannot convey to A-beneficiary, or A-and-B-trustees to A-and-B-beneficiaries. However, *Rye* is also authority – even if somewhat sceptically - for the proposition that a person acting in two distinct legal capacities (e.g. as trustee and beneficiary) *can* grant a lease to themselves under the LPA 1925, and perhaps could do so under the previous common law, if the transaction is not in itself "absurd".[49] Lord Denning took this to mean that s.s. 72 and 82 LPA 1925 *only* avoided absurdity if least one of the persons was not on both sides - although this did not work on the facts of *Rye*'s oral agreement.[50]

Generally, a contract between a trustee and beneficiary is valid as long as the trustee is acting on their own behalf and not as agent.[51] This has long been recognised as a challenging proposition in leases: in 1903, Farewell J. in *Boyce v Edbrooke*[52] described the possibility of a lease granted to a trustee to hold for the benefit of the landlord (a lease by A to B, where B was trustee for A) as an exception to a fundamental principle of equity based on tenuous authority.[53] It seemed clear in that case that joint, as opposed to joint and several, covenants in a lease to oneself and others were unenforceable because of the two party rule in contract.[54] The same approach is taken by s. 82(1) LPA 1925, which works to validate covenants in leases to oneself and others if and only if those covenants are joint and several.[55] Unlike s. 72, it does not make explicit reference to conveyances, only "agreements" – a contractual rather than proprietary focus.

> "82(1) - Any covenant, whether express or implied, or agreement entered into by a person with himself *and* one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone." (emphasis added)

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[49] *Rye v Rye* [1962] A.C. 496 at 513 (Lord Radcliffe).
[50] *Rye v Rye* [1962] A.C. 496 at 513 (Lord Denning).
[51] *Ingram v IRC* [1997] 4 All E.R. 395 at 424; supported by the House of Lords on appeal: [2000] 1 A.C. 293 at 293. Despite the majority of the Court of Appeal in *Ingram*, this seems long-established, see for instance *Neale v Turton* (1827) 4 Bing. 149; 29 R.R. 531.
[52] [1902] B. 580; [1903] 1 Ch. 836.
[53] *Boyce v Edbrooke* [1903] 1 Ch. 836 at 843-5.
[54] The facts required that the lease comply with the Settled Estates Act 1877 and Settled Land Act 1882 as to the applicable covenants, and since it lacked any enforceable covenants, it did not: *Boyce v Edbrooke* [1903] 1 Ch. 836 at 841 (Farewell J.).
[55] *Rye v Rye* [1962] A.C. 496 at 512 (Lord Radcliffe).

Once again, the statutory mechanism is to treat A and B "in like manner" as B alone, ignoring the presence of A on both sides and sidestepping direct engagement with the problems that might engender. Section 82 does not, as was pointed out in *Rye*,[56] change the fundamental principle of contract that a person cannot contract with themselves, and the provision focuses on conveyances to joint parties, not A to A alone.

However, A might convey to themselves in a different legal capacity, for instance under a trust of land or as a personal representative of a deceased person. For the position prior to the 1925 Acts, Farewell J. in *Boyce v Edbrooke* merits quoting at length:

> "If there is one doctrine better settled than another in a Court of Equity it is that a man shall not put himself in such a position that his interest conflicts with his duty. A man cannot be both buyer and seller, or lessor and lessee. Now, to that principle there is said to be one exception, that, under powers of leasing, the donee of the power can lease to a trustee for himself. Assume that is so. It is a perfect anomaly. It is an exception which owes its existence to authority, and not, with all respect, to common sense… but it is clear to my mind that there is no authority, and no ground for saying, that the donee of a power of leasing could lease to himself, either alone or jointly with others, without the interposition of a trustee. Assume for a moment that he can lease to a trustee; that must be because you get a perfectly good contract at law, with covenants at law which can be sued upon and recovered on; and it may be that the fact that the trustee has a right to indemnity over against the lessor may be disregarded."[57]

Having considered the proposed authorities for this supposed exception at equity, Farewell J. concluded they were weak, based on vague statements and exceptions under private acts of Parliament.[58] His conclusion was that:

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[56] *Rye v Rye* [1962] A.C. 496 at 513 (Lord Denning).
[57] *Boyce v Edbrooke* [1903] 1 Ch. 836 at 843-4.
[58] *Boyce v Edbrooke* [1903] 1 Ch. 836 at 844-7 referring to *Taylor v Horde* (1757) 97 E.R. 190; (1757) 1 Burr. 60 at 122 and 124 (no objection to a lease held on trust for oneself, even though the "very definition" of a lease is a contract between landlord and tenant); *Wilson v Sewell* (1766) 4 Burr. 1875; 1 W. Bl. 617 (lease valid at law when granted to trustee for oneself); *Bevan v Habgood* (1860) 70 E.R. 728; (1860) 1 J. & H. 222 (tenant for life or mortgagor may sell or lease to a trustee for themselves).

> "I think it is decidedly unsafe for any one now…to grant a lease to a trustee for himself, or for any one to accept the assignment of a lease granted to a trustee for a tenant for life… on the assumption that the Courts would hold themselves bound… especially as the exception is from one of the most elementary and salutary doctrines of this Court."[59]

How far Farewell J.'s comments should be taken to represent the common law's view on leasing to oneself using a trust in 1903 is questionable: although he doubted their logic, there were, as he noted, established authorities for the proposition widely accepted by practitioners and leading textbooks. In the context of a lease for life, the problem in *Boyce* was compounded by the rules of the applicable statutory regimes, but the case does not represent authority for the general proposition that a lease granted to a trustee for oneself is invalid.

Enforcement of such an agreement, however, is subject to both equitable rules which might make it voidable and procedural objections concerning, for instance, circularity of action.[60] It will similarly be subject to equitable rules about fiduciary duties and breach of trust. In a scenario like *Procter,* the trustee/landlord might run into difficulties in this area if they seek to evict a beneficiary/tenant, for instance.[61] To prevent this, we would expect any given conveyance to be at arm's length, bona fide or in a separate capacity, with fully informed beneficiaries who have (ideally) received independent advice. As a matter of contract, however, there are two parties and a trustee-beneficiary lease is possible.

D. The Impact of Contract Law on Leases to Oneself

Rye interpreted s. 72 LPA 1925 as enabling A to lease to A *and* B, but not A to A alone: any other outcome was deemed "fanciful and whimsical".[62] This turned on the idea that certain features were required in order to create a legally valid contract, and in particular Lord Denning's view that a single land transaction cannot be divided into proprietary and contractual elements. However, s. 72(3) LPA 1925 seems straightforwardly to permit a lease to oneself:

[59] *Boyce v Edbrooke* [1903] 1 Ch. 836 at 847.
[60] *Ingram v IRC* [1997] 4 All E.R. 395 at 424; see also *Procter v Procter* [2021] Ch. 395 at [40].
[61] Or in accordance with Trusts of Land and Appointment of Trustees Act 1996, s. 12, depending on the purposes of the trust.
[62] *Rye v Rye* [1962] A.C. 496 at 506 (Simonds V.C.).

> "72(3) - After the commencement of this Act a person may convey land to or vest land in himself."

This was addressed by Lord Radcliffe in *Rye*:

> "[s. 72(3)] does extend to the grant of a lease by a person to himself in the strictly limited sense that a term of years is not incapable of being created by such a transaction… [but] has nothing to say one way or the other about the substantial validity of a transaction which is absurd in itself, such as a single individual purporting to make himself his own tenant… It could not by itself touch the contractual element that in most situations constitutes the essence of a demise."[63]

Section 72(3) LPA 1925 is textually straightforward, and unlike s.s. 72(1) and (2) uses no comparison with any other kind of conveyance, but *Rye* held that s. 72(3) did not negate the more complex rules in the rest of the section and restricted its application to limited functions in relation to land settlements. If it went further, Lord Denning argued, and extended to legitimating a lease to oneself generally, the mere fact that s. 72(3) refers to the commencement of the Act whilst s. 72(4) deems persons to have always been capable to make the conveyance, with retrospective effect, would create a clear inconsistency.[64]

Instead, *Rye* held that s. 72(3) was designed to serve the purpose of replacing the Statute of Uses mechanism in ensuring that, for instance, a personal representative can vest property in themselves – an example recognised explicitly in the next sub-section, where the language of "in like manner" appears again:

> "72(4) - Two or more persons (whether or not being trustees or personal representatives) may convey, and shall be deemed always to have been capable of conveying, any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party; provided that if the persons in whose favour the conveyance is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance shall be liable to be set aside."[65]

[63] *Rye v Rye* [1962] A.C. 496 at 510 (Lord Radcliffe).
[64] *Rye v Rye* [1962] A.C. 496 at 514.
[65] See also Administration of Estates Act 1925, s. 36.

This provision, which did not have a precursor statute, explicitly recognises the potential for conflicting interests, inter alia, where a trustee/beneficiary relationship is involved. Millett L.J. in *Ingram* held that there was nothing to stop a beneficiary being granted a lease by a trustee any more than there was to stop a contract between the same.[66] Section 72(4) similarly acknowledges that transactions between trustee and beneficiary may be both valid as a matter of property and voidable for breach of fiduciary duties. The *Rye* interpretation of s72(3) is that it applies to the same scenarios as 72(4), with a single trustee instead of two or more.

This is not satisfactory: if that was the statutory intention, why not use the same wording concerning "trustees or personal representatives" in s. 72(3)? The *Rye* interpretation is also inconsistent with how contemporary lawyers understood the 1925 Act provisions. For instance, the first edition of Cheshire's *The Modern Law of Real Property*, printed in 1925, explains that the Statute of Uses was formerly used to facilitate a conveyance from oneself to oneself and others jointly, but since 1857 and 1881 leaseholds and freeholds respectively could be conveyed to oneself and another jointly using a deed.[67] This is consistent with *Rye* and *Procter*. Cheshire then notes, however, that:

> "There are also occasions when it is necessary that a person should convey land to himself (as, for example, where personal representatives assent to the land vesting in themselves as trustees for sale). Although, in the example given, the design could be effected in a direct manner under statutory provisions, it remained generally true, prior to 1926, that a conveyance by a person to himself required a grant to uses. It is now provided, however, that "a person may convey land to or vest land in himself" (section 72(3)). Under the old law it was in some circumstances doubtful whether a grant by A and B to B was valid, but such a conveyance (whether A and B are trustees or personal representatives or not) is now valid, though, if the conveyance amounts to a breach of trust, it is liable to be set aside (section 72(4))."[68]

Finally, Cheshire's summary of the changes effected by the 1925 Acts includes:

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[66] *Ingram v IRC* [1997] 4 All E.R. 395 at 423.
[67] Geoffrey Chevalier Cheshire, *The Modern Law of Real Property*, 1st edn (London: Butterworth, 1925) at pp. 596-7.
[68] Geoffrey Chevalier Cheshire, *The Modern Law of Real Property*, 1st edn (1925) at p. 597.

> "Conveyances to self. A person may convey land directly to himself (LPA s 72(3)); and two or more persons may convey any property vested in them to any one or more of themselves (LPA s72(4))."[69]

Whilst the example of the personal representative is consistent with *Rye*'s interpretation, Cheshire does not seem to have thought the provision limited to those circumstances the way the judges in *Rye* did – "whether trustees or personal representatives or not" indicates the opposite. The supposed retrospective effect of s. 72(4) may be explained by Cheshire's comment that it was "sometimes doubtful" that the common law was the same – i.e. s. 72(4) did not have retrospective effect, but confirmed the law prior to 1925.

The conclusion in *Procter* was that the common law position was the same as the LPA 1925 rule in *Rye*: the grant of a tenancy with complete identity between landlord and tenant was not possible, but a grant where there was not complete overlap was permitted. The difference between common law and statute was deemed mechanical, distinguished by the prohibition of tenancies in common at law and need for written instruments under the LPA 1925. This seems to have also been assumed by the parties in *Rye*, but on the facts was not argued. However, s. 72 of the LPA 1925 was not intended to have the effect attributed to it four decades later by *Rye* – it was to facilitate a lease to oneself where the common law had formerly prohibited it. Further, it took the case of *Ingram,* seventy years after the enactment of the 1925 Act and thirty years after *Rye*, to confirm that a trustee-beneficiary lease was possible – and only then via a dissenting judgment in the Court of Appeal which differed from the views of both parties to the case.

The reluctance to recognise a property right when there is a lease to oneself in post-1925 law ultimately stems from the contractual aspect of the lease, not the proprietary aspect explored thus far. Accepting that a lease to oneself is possible, or the even the possibility of a trustee-beneficiary lease, engenders the prospect of a lease which is an estate in land without contractual content. This, however, is inconsistent with the increasingly contractualised approach to leases in English law.

IV. The Lease as a Contract

[69] Geoffrey Chevalier Cheshire, *The Modern Law of Real Property,* 1st edn (1925) at p. 775.

A person cannot contract with themselves: they cannot both make and accept an offer, they cannot accept an offer for something they already own; they cannot (or would not) enforce a contract against themselves. At common law, it seemed just as impossible (and "senseless") to contract with yourself and others jointly,[70] and this logic extended to leases, where *Grey v Ellison* considered it "futile and an abuse of language" to say that a lease to oneself fell within contract (or tax) law.[71] The Court of Appeal in *Rye* inclined to the conclusion it reached because it could not imagine how the proposed lease to oneself could exist if not as a contract. However, this focus on contractual content is to misunderstand the nature of the lease, as recognised by Millett L.J. and the House of Lords in the subsequent case of *Ingram* v *IRC*.[72] Leases, whilst often created by contract, can also be created by grant or attornment, and the form of the mortgage under the LPA 1925 was exactly the sort of lease with no covenants these cases object to.[73]

In *Ingram*, the lease was granted by a solicitor acting as bare trustee to Lady Ingram, his client and beneficiary. The majority of the Court of Appeal thought this fell foul of *Rye.*[74] Millett L.J.'s dissent, which was approved by the House of Lords, takes a wider view, applying the same principles at least as far as beneficiary-to-trustee leases.[75] *Ingram* nonetheless held that a conveyance to oneself where A-trustee leased to A-beneficiary, where one person would be entitled to exclusive possession against themselves (and only themselves) in their different capacities, was impossible because there was a contractual requirement that there were at least two parties.[76] At the very least, this leaves the possibility of leases from A to A and B valid under s. 72 LPA 1925, with no sensible contractual content because A cannot contract with themselves. If the proposition in the above sections of this article, that *Rye* misinterpreted s. 72 LPA 1925, is accepted, it also falls to explain how the lease to oneself under that statute could be reconciled with the contractual rule.

Older case law struggles less with the absence of covenants than more recent decisions: in the case of *Napier v Williams*, notwithstanding that a lease existed, Warrington J. held the covenants unenforceable, following his own judgment in *Ellis v Kerr.*[77] This did not, in his opinion, preclude the existence of a valid lease as it might have for Lord Denning fifty years later.[78] Warrington J.'s

[70] *Faulkner* v *Lowe* (1848) 154 E.R. 628; (1848) 2 Ex. 595.
[71] *Grey v Ellison* (1856) 1 Giff. 438 at 444.
[72] *Ingram v IRC* [1997] 4 All E.R. 395 at 421; see further [2000] 1 A.C. 293 (H.L.) at 296.
[73] Now replaced by the legal charge and prohibited under LRA 2002, s. 23.
[74] *Ingram v IRC* [1997] 4 All E.R. 395 at 401 and 416 (Evans L.J.).
[75] *Ingram v IRC* [1997] 4 All E.R. 395 at 427.
[76] *Ingram v IRC* [1997] 4 All E.R. 395 at 423; *Procter v Procter* [2021] Ch. 395 at [41].
[77] [1910] 1 Ch. 529; [1910] 2 W.L.U.K. 58.
[78] *Rye v Rye* [1962] A.C. 496 at 514.

view was that the lease could still be forfeited for breach of covenant, even though the covenants could not be enforced: a valid lease existed as a property right – albeit with limited contractual content. Section 82 of the LPA 1925 has since intervened, as noted above, to validate the contractual content of a lease where the covenants are between A and A and B, i.e. in the lease to oneself and others scenario. This does not, however, assist in pure lease to oneself cases.

Millett L.J.'s judgment in *Ingram* was careful to explore both the contractual and proprietary aspects of leases, but both Millett L.J. and the House of Lords emphasised that a lease is much more than a kind of contract.[79] Whilst the lease might have originated as contract in medieval law,[80] it is now a legal estate in land.[81] It can be created by contract, but also by statute, and the obligations to which it gives rise are enforceable by privity of estate alone.[82]

This is particularly obvious in relation to leasehold covenants. As early as the fifteenth century it was recognised that when land was leased for a term of years, the relation of landlord and tenant gave rise to an implied covenant for quiet enjoyment and title.[83] It became customary to make express covenants "qualifying the generality of the covenant in law" and "restraining it by the mutual consent of both parties".[84] It came to be that a lease had the "usual covenants" implied when they were not explicitly set out,[85] and in current law, the landlord covenant for quiet enjoyment is implied in all landlord-tenant relationships.[86] However, leasehold covenants rely on the privity of estate in the landlord-tenant relationship, not privity of contract – although the latter also exists between the original landlord and tenant for the whole term at common law.[87] A covenant is not an ordinary contract, but a condition annexed to the estate in the land such that

[79] *Ingram v IRC* [2000] 1 A.C. 293 (H.L.) at 296.
[80] This is a somewhat simplistic characterisation: William M. McGovern, 'The Historical Conception of a Lease for Years' (1976) 23 U.C.L.A. Rev. 501, however leases were clearly not estates in land from an early date: (1333) Y.B. M. 7 Edw. III f. 45a pl. 8 (Herle C.J.): "he had nothing in the tenements but a term of years, which is no estate in law"; Frederic W Maitland, 'Seisin of Chattels' (1885) 1 L.Q.R. 324.
[81] *Ingram v IRC* [1997] 4 All E.R. 395 at 422.
[82] *Ingram v IRC* [1997] 4 All E.R. 395 at 422.
[83] William Searle Holdsworth, *An Historical Introduction to the Land Law* (London: Oxford University Press, 1927) at p. 236.
[84] William Searle Holdsworth, *An Historical Introduction to the Land Law* (1927) at p. 236.
[85] Stuart Bridge, Elizabeth Cooke, Martin Dixon (eds.), Robert Megarry and William Wade, *The Law of Real Property,* 9th edn (London: Sweet and Maxwell, 2019) 18-002*; Propert v Parker* (1832) 40 E.R. 107; (1832) 3 My. & K. 280.
[86] Stuart Bridge, Elizabeth Cooke, Martin Dixon (eds.), Robert Megarry and William Wade, *The Law of Real Property,* 9th edn (2019) 18-006.
[87] Stuart Bridge, Elizabeth Cooke, Martin Dixon (eds.), Robert Megarry and William Wade, *The Law of Real Property,* 9th edn (2019) 19-003; a position now amended by the Landlord and Tenant (Covenants) Act 1995.

the benefit and burden of performing it runs with both the reversion and the lease term.[88] This is why covenants are enforceable between landlord and tenant even where they are not the original parties to the contract, but not enforceable between landlord and sub-tenant: they have neither privity of contract nor of estate.[89] In the words of Nourse L.J. in *City of London v Fell*:[90]

> "A lease of land, because it originates in a contract, gives rise to obligations enforceable between the original landlord and the original tenant in contract. But because it also gives the tenant an estate in the land, assignable, like the reversion, to others, the obligations, so far as they touch and concern the land, assume a wider influence, becoming, as it were, imprinted on the term or the reversion as the case may be, enforceable between the owners thereof for the time being as conditions of the enjoyment of their respective estates. Thus landlord and tenant stand together in one or other of two distinct legal relationships. In the first it is said that there is privity of contract between them, in the second privity of estate."[91]

Even if every one of the contractual covenants falls away, there will still be privity of estate, and certain consequences follow from the fact there is an estate in land. Whilst the incidents of leaseholds have always differed from freehold in their mode of protection, the principles have been the same for much of the history of the lease.[92] When the incidents of freehold tenure were deliberately simplified as a part of the reforms enacted in the 1925 Acts, the intention was to do so by "assimilating" freehold and personalty: freehold property in land would look as much like moveable property as possible, and failing that, would have the incidents of a chattel real.[93] And yet, the implications of this for the leasehold appear not to have been fully thought out at the time. As Roche has explored, even the foundational statement that the reforms would result in the existence of only two core estates in land – freehold and leasehold – may have originated in

[88] Geoffrey Chevalier Cheshire, *The Modern Law of Real Property*, 1st edn (1925) at pp. 188-9; William Searle Holdsworth, *A History of English Law*, vol. 3, 1st edn (London: Methuen & Co, 1909) at p. 131.
[89] Stuart Bridge, Elizabeth Cooke, Martin Dixon (eds.), Robert Megarry and William Wade, *The Law of Real Property,* 9th edn (2019) 19-006; *Webb v Russell* (1789) 100 E.R. 639; (1789) 3 Term Rep. 393. Under LPA 1925, s. 146(4) an underlessee in this situation can apply to court to have the property vested in them for such a term and with such conditions as the court sees fit.
[90] [1993] Q.B. 589; [1993] 2 All E.R. 449.
[91] *City of London v Fell* [1993] Q.B. 589 at 603-4.
[92] William Searle Holdsworth, *An Historical Introduction to the Land Law* (1927) at p. 122.
[93] Arthur Underhill, *The Line of Least Resistance: An easy but effective method of simplifying the law of real property* (London: Butterworth and Co, 1918) at p. 29; Geoffrey Chevalier Cheshire, *The Modern Law of Real Property,* 1st edn (1925) at p. 753.

Parliamentary rhetoric and eventually leaked into the statute, contrary to- and in conflict with- the original drafting.[94] The emphasis on making real property as much like personal property as possible in order to simplify conveyancing dominated Victorian and Edwardian narratives about land law reform, and the focus on making land as much like any other commodity as possible left little room for debate about the substantive features of the law, including considering the important role that long leasehold played in markets like London, Oxford, and Bristol when discussing registration, or what how the drastic simplification of freehold was likely to affect leasehold.[95]

A difficulty with the 1925 Acts, and particular s. 1 of the LPA 1925, is that it changed the formal categorisation of the lease. A "lease for years" was previously an estate involving possession of the term, not the land. The estate in land, and its seisin, remained with the freeholder.[96] The lease for years' status as a chattel real gave rise to special actions to recover that possession,[97] but it was kept distinct from the freehold estates in land like the "lease for life" until the 1925 reforms. This did not prevent the use of the term "leasehold estate", which, if used properly, formerly indicated a personal estate.[98] By the time of the reforms at the start of the twentieth century, lawyers were also in the habit of using "estate" to sometimes indicate a person's entire collection of valuable interests in land or goods, i.e. as a synonym for "property" generally.[99]

It follows from the fact that the lease is an estate in land – howsoever we ended up in that position after 1925 - that not all rights and obligations between landlord and tenant are contractual. The 1925 Act could be seen to have had the effect of upgrading what were previously implied terms in a specific and special kind of personal estate and contract (a term of years) into new incidents of an estate in land: in fact, the core feature of a lease in the form of the landlord covenant for quiet enjoyment is described in *Ingram* as an "incident" of the estate of the lease, not a contractual

[94] Juanita Roche, 'Historiography and the LPA 1925: The Return of Frankenstein' (2018) 77(3) C.L.J. 600 at 610-6.
[95] J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832-1940* (Oxford: Clarendon Press, 1992) at pp. 131-4.
[96] Thomas Littleton and Thomas E. Tomlins (ed.), *Littleton, His Treatise of Tenures,* vol. 1 (London: S. Sweet, 1841) at p. 69.
[97] By the sixteenth century it was possible to recover possession when ousted by the lessor or a stranger, if the term had not ended, see e.g. Fitzherbert, *Novel Natura Brevium* (1534) B. & M. 200.
[98] As in *Belaney v Belaney* (1867) L.R. 2 Ch. App. 138; [1867] 1 W.L.U.K. 23. H. W. Challis had objected to the inappropriate use of the terms "tenement" and "leasehold tenure" in respect of leases in the late nineteenth century, allowing that even Coke and Littleton called leasehold a tenure, but that this did not make it a tenement or confer seisin on leaseholders: 'Are Leaseholds Tenements' (1890) 6 L.Q.R. 69.
[99] See e.g. Joshua Williams, *Principles of the Law of Real Property,* 18th edn (1896) at p. 8.

feature.[100] Following the conventions of the law before 1925, the word "leasehold" as opposed to "freehold" ought to indicate the tenure under which land was held, and therefore the incidents of that estate, whereas words like "fee simple", or, presumably "term of years absolute" describe what kind of estate, particularly as to quantum, is held[101] - in the case of a lease, a non-perpetual exclusive possession of land.

The existence of a leasehold also gives rise to incidents in the reversionary estate. Section 10 of the Conveyancing Act 1881 once provided that every condition of re-entry and other condition contained in a lease was to be "incident to the reversionary estate", notwithstanding that the landlord might also sue the tenant in contract for rent, including rent service, the right to re-enter, and, formerly, the remedy of distress.[102] One practical impact of this is demonstrated by the application of the bona fide purchaser rule: Millett L.J. noted that if a bona fide purchaser for value were to take the freehold in *Ingram* (in breach of trust by the trustee) – or, logically, in any other trustee-beneficiary lease, they would take subject to the lease because it was a legal estate in land, even without notice.[103] What would this mean were there no contractual covenants? It would mean what a lease always does: that the tenant had exclusive possession for a term of years.[104]

If this is correct, the fact that it has been the practice to deviate, supplement, or confirm these incidents in contractual terms – or the fact that leases were originally contractual and not estates in land - does not alter this. In Millett L.J.'s words, the right to exclusive possession "is a consequence of the ownership of the legal estate; it is not merely a contractual right".[105] Contract is often the mechanism whereby that estate is created, transferred, and/or modified – as *Megarry & Wade* says:

> "A lease is a bilateral contract which, as a general rule, *confers* an estate in the land capable of binding third parties. The contract is one "for the exclusive possession and profit of

[100] *Ingram v IRC* [1997] 4 All E.R. 395 at 409 refers to non-derogation from grant; *Ingram v IRC* [2000] 1 A.C. 293 (H.L.) at 303 (Lord Hoffmann) specifically uses the word "incident".
[101] See e.g. Joshua Williams, *Principles of the Law of Real Property,* 18th edn (1896) at p. 350 and p. 8.
[102] Conveyancing Act 1881 (Stat. 44 & 45 Vict. c. 41), s 10. See e.g. Joshua Williams and Cyprian Williams (ed.), *Principles of the Law of Real Property,* 19th edn (London: Sweet and Maxwell, 1901) at pp. 329-30 for the position immediately prior to the 1925 reforms.
[103] *Ingram v IRC* [1997] 4 All E.R. 395 at 423. The situation would obviously differ if this was an equitable lease.
[104] *Street* v *Mountford* [1985] A.C. 809 (H.L.).
[105] *Ingram v IRC* [1997] 4 All E.R. 395 at 422.

land for some determinate period". The *estate so created*, whatever its duration, may be referred to as a leasehold, a tenancy or a term of years."[106]

However, what modern cases tend to underemphasise is that once that estate exists, the property right is subject to all the incidents of that estate by default, insofar as they have not (or cannot have) been altered by agreement. It is vital to remember that not all leases are contracts: some conveyances are simply grants, which the recipient can accept or reject; conveyances such as deed polls are clearly conveyances but not contracts – the legal rules concerning conveyances in fact emerged long before the modern law of contract. A lease has a life of its own as a legal property right, not a special species of contract.

Lord Denning's obiter opinion in *Rye* was that this separation of estate and contract is impossible. This was incorrect. Whilst the concept of a lease as a bare estate in land may be impractical in some contexts, and more likely to arise in particular scenarios like collapsed sub-leases or will trusts, it can exist as a matter of property law. In Lord Hoffmann's words, "in a case such as this… the contractual nature of the lease seems to me a matter of conveyancing theory rather than substance".[107] This is particularly significant when considered alongside the development of the controversial non-proprietary lease in *Bruton v London and Quadrant Housing Trust* - its mirror image.

V. Coherence of the Lease as both Property and Contract

In 1999, the House of Lords handed down judgment in *Bruton*.[108] A London council had granted a licence to a housing charity (a lease would have been ultra vires under the Housing Act 1985).[109] The housing charity then granted further licences to the people using its accommodation. Bruton's flat was in disrepair, and he sought to enforce the repairing obligations in s. 11 of the Landlord and Tenant Act 1985. This, of course, required the presence of a lease. But, as Bruton was in possession pursuant to a licence granted to the housing charity, it was hard to see how he could possibly have had a lease: *nemo dat quod non habet*.

[106] Stuart Bridge, Elizabeth Cooke, Martin Dixon (eds.), Robert Megarry and William Wade, *The Law of Real Property*, 9th edn (2019) 16-001 (emphasis added).
[107] *Ingram v IRC* [2000] 1 A.C. 293 (H.L.) at 304
[108] See generally Amy Goymour, 'Bruton v London & Quadrant Housing Trust [2000]: Relativity of Title, and the Regulation of the 'Proprietary Underworld' in Simon Douglas, Robin Hickey, and Emma Waring (eds.), *Landmark Cases in Property Law* (London: Bloomsbury Academic, 2015) and citations therein.
[109] Housing Act 1985, s. 32.

The House of Lords in *Bruton* concluded the fact of exclusive possession was so persuasive that it might in itself create a purely contractual right called a lease or tenancy, even without the estate in land which habitually corresponds to those words as a result of s. 1 LPA 1925. This birthed the "non-estate tenancy":

> "[A lease or tenancy] describes a relationship between two parties… not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding on third parties… [as that depends] upon whether the landlord had an estate out of which he could grant it."[110]

This decision generated well-known objections. It has also been explained in terms of relativity of title and original, rather than derivative, acquisition without the need to countenance a non-estate tenancy.[111] The latter approach has some support in the judgment of the House of Lords in the related case of *Kay v Lambeth,*[112] which talked about the *Bruton* tenancy in terms not of a derivative interest or sub-tenancy, but a tenancy of a different interest created by the housing trust (see at [144-5]) - although that case nonetheless confirmed the contractual and non-proprietary nature of the *Bruton* lease. This sits at the opposite end of the spectrum to *Procter* and other lease to oneself cases, which emphasise the proprietary lease notwithstanding the absence of contractual content.

The *Bruton* case is also a part of a general trend over many years to focus on the contractual aspect of leases - particularly residential leases, where the imbalance of power and consumer-trader nature of the contract warrants statutory protections.[113] The reminder from *Ingram* that exclusive possession is an incident of the legal estate of the lease, and not a contractual feature, complements Goymour's analysis of *Bruton* where the lease to oneself cases would otherwise appear to conflict with it. Exclusive possession is key to leases, which can exist as a legal estate both without contractual content and as a derivative title in the unusual *Bruton* scenario. The focus on the presence or absence of contractual features such as covenants or implied terms providing consumer protection has obscured this and made it particularly difficult for the law to recognise that both a lease without covenants and a derivative lease can exist as legal estates in land.

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[110] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406 at 415 (Lord Hoffmann).
[111] Amy Goymour, 'Bruton v London & Quadrant Housing Trust [2000]: Relativity of Title, and the Regulation of the 'Proprietary Underworld' in Simon Douglas, Robin Hickey, and Emma Waring (eds.), *Landmark Cases in Property Law* (2015).
[112] [2006] UKHL 10; [2006] 2 A.C. 465.
[113] As Bright has noted, the same trend has not generally been visible in relation to commercial or agricultural leases: 'Introduction' in idem (ed.), *Landlord and Tenant Law: Past, Present and Future* (2006) at p. xvii.

However, revisiting the context in which the 1925 Act was created suggests its architects might well have agreed that some leases are best treated as contract. Sir Leslie Scott, one of the key figures in the development of the 1925 Act, said in a 1922 House of Lords debate:

> "We do not want to interfere with a contract freely made within the length of time for which the contracting parties may reasonably have anticipated that the contract as a contract would continue to be effected. *Leasehold property, after the lapse of a certain length of time, ceases to have any really contractual character, and it becomes a type of tenure rather than the result of a mere contract or undertaking between parties freely made.* We want to draw a reasonable line between the anomaly we see at the present time of leasehold estates, long after the leases have been created, becoming encumbered by obsolete covenants, and, on the other hand, freedom of contract."[114]

Scott's understanding of the subject after several years of work was that a lease is not only, or not necessarily at all, a contract, but that short leases are more contractual in nature than long ones. A contrast between long leases as estates and short leases as contracts can be seen throughout the land reform discussions which began in the mid-nineteenth century and culminated in the 1925 Acts: for instance, in the 1840s, short leases in possession at rack rent were distinguished as contractual, compared to longer leases which were to be noted on a proposed register of title.[115] Short leases were generally made under hand, rather than under seal in deeds, such that the action for breach was different: short leases were actionable in assumpsit, as simple contracts, rather than via proprietary actions.

The possessory element of leases was also a key element in debating whether to make them registrable in the 1870s, with registration again proposed for only long leases.[116] Whilst little has been made of this difference since 1925 abolished, inter alia, the freehold lease for life, a similar distinction has been suggested more recently by the Law Commission. In its Report *Renting Homes* in 2006, it proposed that residential tenants be offered statutory protection via a simplified "occupation contract".[117] Were this adopted, it seems the *Bruton* lease would not be required – at least not on the facts of that case. The application of lease to oneself rules, and the rule in *Rye,*

[114] H.C. Deb. 14 June 1922, vol. 155, c.c. 432-9 at 437-8 (Leslie Scott, emphasis added).
[115] J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832-1940* (1992) at p. 67 and p. 95.
[116] J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832-1940* (1992) at pp. 117-8.
[117] Law Commission Report No. 297, *Renting Homes* (2006) at [1.4]-[1.6] and [3.9].

would be limited to relationships outside the housing sector, and avoid clashing with the need to use covenants to protect the occupation of tenants with limited bargaining power. This would not resolve the problems with *Rye,* but would limit the application of lease to oneself rules to the kinds of leases where the contractual relationship is less vital, weakening objections of the sort Lord Denning made.

VI. Conclusion

In *Procter*, the Court of Appeal held that there was, ultimately, a tenancy with protection under s. 2 AHA 1986. The effect was to reduce the value of the Farm Land, and thus the value of Suzanne Procter's share in it. For the Procter family, this was just one question among many in untangling their inheritance dispute. From a legal perspective, it generated an improbable arrangement falling through the gaps of the LPA 1925 regime.

The relationship between principles of contract and land law can be difficult and their interrelation may have been simpler to conceptualise in English law before widespread land registration. Under the LPA 1925 and LRA 2002, written contracts are required for many actions in respect of rights in land, often with the additional formalities associated with deeds.[118] But, as the LRA 2002 deems the register and registration as conclusive as to property rights,[119] the contract or conveyance does not tell the whole story.[120] Even with registration issues aside, in cases like *Rye, Ingram,* and *Procter*, contractual rules looking to the substance and effect of the purported lease suggested a different conclusion to the property rules facilitating its creation.

Procter serves to highlight problems with our concept of a lease. It is not coherent to maintain that all leases are both estates in land and contracts, that they can be contracts without being estates, and that they can be estates without contracts, all at the same time. And this is not necessary: leases are estates in land which may have more or less contractual content, but which will create privity of estate between a landlord and tenant. This might take the form of a lease to oneself; oneself and others; a lease with unenforceable circular covenants between a trustee and a beneficiary; or a relative title as in *Bruton*. If contractual content and consumer protection are the priority in some contexts, the occupation would best be treated as a special species of contract rather than an estate

[118] Law of Property (Miscellaneous Provisions) Act 1979, s. 2.
[119] LRA 2002, s. 58.
[120] LPA 1925, s. 54(2).

in land, as the Law Commission has proposed. The drafters of the LPA 1925 do not seem to have expected otherwise, notwithstanding s. 1 of that Act. Leases have always been varied and flexible, enabling them to adapt and be put to a staggering array of social and commercial purposes over hundreds of years. They need not be stuck between this rock and this hard place.

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